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**in the
Supreme Court
of the
United States**

OCTOBER TERM, 1977

NO. 77-151

**HARRY T. MANGURIAN, JR. and DOROTHY
MANGURIAN, his wife, and DREXEL PROPERTIES,
INC., a Florida corporation,**

Petitioners,

v.

**CLAYTON P. THOMPSON, WILLIAM M. WYANT,
and VIRGINIA WYANT, his wife, individually and on
behalf of all others similarly situated,**

Respondents.

**RESPONDENTS' BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI**

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REASONS FOR DENIAL OF THE WRIT

A.

THE PETITION FOR WRIT OF CERTIORARI FAILS TO DEMONSTRATE CONFLICT WITH OTHER COURTS OF APPEAL WITH RESPECT TO THE APPLICATION OF 15 U.S.C. §15 (b).

Petitioners seek to invoke the jurisdiction of this Court alleging that the decision of the Court below is in conflict with the decision of the Sixth Circuit in *Akron Presform Mold Co. vs. McNeil Corporation*, 496 F.2d 230 (6th Cir. 1974), cert. den. 419 U.S. 997 (1974), and is in conflict with the decision of the Ninth Circuit in *Steiner vs. 20th Century-Fox Film Corp.*, 232 F.2d 190 (9th Cir. 1956).

An analysis of the above decisions fail to demonstrate conflict. With respect to the decision of the Sixth Circuit in *Akron*, supra, the Plaintiffs in that cause pled and attempted to prove an avoidance of the Statute of Limitations on two (2) specific grounds. Those grounds were: (a) speculative damages occurring within the period of limitations and resulting from conduct occurring beyond the period of limitations; and (b) fraudulent concealment by the Defendants which resulted in the Plaintiffs being caused to suffer an expiration of the time requirements of the subject limitations period. The decision of the Sixth Circuit is replete with language which clearly indicates that Plaintiffs pled those exceptions specifically, relied upon them specifically, and failed to provide evidence to support those allegations to avoid the Statute of Limitations. The Plaintiffs in *Akron*, supra, did *not* plead the continuing violation theory, nor did they attempt to prove it. Accordingly, there

can be no conflict between the decision of the Sixth Circuit in *Akron* and the decision below in the instant cause. The lack of conflict can be clearly seen in the following quotations from the decision of the Sixth Circuit in *Akron*:

Since the complaints in the present action were filed on July 3, 1968, the first question is whether any injurious overt act has occurred since July 3, 1964. Presform admitted to the Trial Court that all acts commencing the alleged unlawful conspiracies began more than four years before the filing of the complaints in these actions, but contended that its anti-trust claims were not barred because its claims fell within the *Zenith* and fraudulent concealment exceptions of the application of the Statute of Limitations. The burden thus shifted to Presform to prove that the operation of the Statute could be avoided by either exception. *Akron Presform Mold Co. vs. McNeil Corporation*, supra, at page 233. . . .

Without reaching the merits of Presform's claims we hold that the District Court did not err in dismissing Presform's actions as barred by the Statute of Limitations. Presform allowed its claims to slumber. Evidence has faded and witnesses may have disappeared. Since neither the *Zenith* exception nor the fraudulent concealment exception tolled the Statute in this case, it was entirely consistent with the purposes of the Statute of Limitations for the District Court to determine that the Appellees should be free of Presform's stale claims. *Akron*, supra, at page 234.

Unlike the Plaintiffs in *Akron*, Plaintiffs, Respondents herein, pled and made a prima facie showing of a continuing violation exception to the application of the Statute of

Limitations, as recognized in the numerous authorities as cited within the decision of the Court below. There is no conflict between the decision of the Fifth and Sixth Circuits. It is also important to note that the Sixth Circuit cited in *Akron*, supra, the case of *Baker vs. F & F Investment*, 420 F.2d 1191 (7th Cir. 1970). Although cited on other grounds in *Akron*, supra, the Court below also relied on *Baker*, supra, reflecting the lack of conflict alleged to be existent herein.

In reliance upon *Steiner*, supra, Petitioners attempt to create conflict between an outdated and inapplicable decision. The decision of the Court below in this cause is wholly consistent with the later decisions of the Ninth Circuit in *Hoopes vs. Union Oil Co. of California*, 374 F.2d 480 (9th Cir. 1967), and *Twin City Sports Service, Inc. vs. Charles O. Finley, Inc.*, 512 F.2d 1264 (9th Cir. 1975). In *Hoopes*, supra, a decision rendered eleven (11) years after *Steiner*, supra, the Ninth Circuit clearly held that entry into a contract that included an exclusive dealing provision was not considered the last overt act for the purposes of determining when the Statute of Limitations begins to run, but the continued enforcement of the contract by the Defendant constituted overt acts in furtherance of the conspiracy, even though those acts directly flowed from the contract, were provided for within the contract, and were not acts independent of the contract which formed the basis of the alleged violation.

Consistent with their decision in *Hoopes*, supra, the Ninth Circuit in *Twin City Sports Service, Inc.*, supra, held that the action was not barred by the Statute of Limitations, even though the last amendment or extension of the contract which formed the basis of the alleged violations was entered into in 1954, and the action was not filed until

1968. Again, the acts complained of flowed directly from the contract and were provided by the contract, as opposed to being acts independent of the contract. Supreme Court Justice Clark, sitting by designation, considered a contract of thirty-three (33) years, and summarily rejected the argument that the Statute of Limitations began to run at the time that the contract was executed, and further rejected the argument that the date of the last amendment or extension of the contract operated as a last overt act in furtherance of the conspiracy for the purposes of determining when the Statute of Limitations begins to run. The following language from the decision of the Ninth Circuit in *Twin City Sports Service, Inc.*, supra, is relevant to show the lack of conflict between the decisional law of the Ninth Circuit on this issue and the case before this Court:

Sports Service argues that Finley's suit is barred because it was not filed within four years of the last allegedly damaging act, the amendment or extension of the contract to its complete thirty-three year duration in 1954. This argument overlooks the necessarily continuing nature of the alleged harm . . .

We are not dealing with a violation which, if it occurs at all, must occur within some specific and limited time span. Rather, we are dealing with conduct which constituted a continuing violation of the Sherman Act, and which inflicted continuing and accumulating harm . . . Thus, the fact that the final amendment to the contract was made in 1954 does not preclude Finley from bringing suit in 1968. To hold otherwise is to say that some damage that might have been sustained was barred before it accrued.

Apparently Petitioners have recognized that there may be some difficulty in demonstrating conflict between the decision below and the decisions of the Sixth and Ninth Circuits, because they have gone beyond Rule 19 of this Court and have attempted to establish that there is conflict based upon decisions of the District Courts of New York. Not only do the various trial court decisions cited by Petitioners in their Petition fail to reflect conflict, assuming for the moment that a conflict existed, that would not be conflict sufficient to invoke the jurisdiction of this Court pursuant to Rule 19.

As can be seen by the above-described discussion, Petitioners have failed to establish conflict as interpreted by this Court under Rule 19 sufficient to invoke the jurisdiction of this Court. The Supreme Court of the United States has consistently determined what is conflict for the purpose of invoking its jurisdiction. *U.S. vs. Muniz*, 374 U.S. 150 (1963); *Rice vs. Sioux City Memorial Parks Cemetery*, 349 U.S. 70 (1955); *U.S. vs. Zack*, 375 U.S. 59 (1963); *Bingler vs. Johnson*, 394 U.S. 741 (1969). Each of those cases, as will be briefly discussed below, reflected a direct conflict on an important federal question between various Courts of Appeal which compelled the Court to invoke its discretionary jurisdiction to resolve that conflict.

In *U.S. vs. Muniz*, supra, the question concerned whether a prisoner may bring a claim under the Federal Tort Claims Act for injuries suffered resulting from the negligence of Federal employees. Certiorari was granted because of the importance of the federal question, and two (2) Courts of Appeal had expressly said that such a claim could not be brought, but the Second Circuit determined that such a claim could be brought. Thus, the direct con-

flict, and the important federal question being existent, jurisdiction was invoked to resolve the conflict.

In *Rice vs. Sioux City*, supra, this Court first granted certiorari, and proceeded to determine the case. Upon rehearing, the Court realized that the conflict which had been apparent was not existent, the importance of the question was not significant enough for a decision, and vacated its order and dismissed the Petition for Writ of Certiorari. In so holding, the Court clearly stated that certiorari should not be granted except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties to the cause, and in cases where there is a real and embarrassing conflict of opinion and authority between Courts of Appeal. Such is not the case here.

U.S. vs. Zack, supra, concerned an action to recover certain tax refunds. Jurisdiction was invoked because of the recurring importance of the problem in the administration of the tax laws, and a direct conflict between the decision below of the Court of Claims and certain Courts of Appeal decisions. The conflict was direct, in that certain decisions held that the refund was proper, and others said that the refund could not be made on the direct question involved.

Similarly, in *Bingler vs. Johnson*, supra, there was a direct conflict between the decision of the Third Circuit which held that Section 117 of the Internal Revenue Code of 1954 was invalid, in that the Fourth, Sixth and Tenth Circuits had previously expressly upheld the validity of Section 117 of the Internal Revenue Code of 1954, and there had been no prior Supreme Court review of any of those decisions.

Petitioners, having failed to demonstrate direct conflict, or any conflict whatsoever, should not receive the discretionary review of this Court, and their Petition should be denied.

B.

THE PETITION FOR WRIT OF CERTIORARI FAILS TO DEMONSTRATE A DECISION ON AN IMPORTANT QUESTION OF FEDERAL LAW SUFFICIENT TO CONFER JURISDICTION UNDER RULE 19 OF THIS COURT.

Having failed to demonstrate conflict, Petitioners then switch over to the next futile attempt to establish an important federal question pursuant to Rule 19 of this Court. This Court, in deciding *Rice vs. Sioux City Memorial Parks Cemetery*, supra, has discussed this question, and that language should be reviewed at this time:

A federal question raised by a Petitioner may be 'of substance' in the sense that: abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. (citing cases). *Rice vs. Sioux City*, at page 616.

Rice vs. Sioux City, supra, also lists the cases of this Court wherein cases so numerous that they need not be again recited herein were rejected on the federal question argument identical to the one advocated by Petitioners herein.

The lack of a substantial federal question can perhaps best be seen in the argument of Petitioners themselves. Petitioners argue at page 14 of their Petition that the Court below has interpreted a federal statute contrary to the intent of the Congress, and at page 15 state that they have done so because they have made the Statute of Limitations a mere measure of damages. Their support for this statement is the reliance of the Fifth Circuit on the Rule that the Plaintiffs may sue only for damages that result from acts committed by the Defendants within the four (4) years preceding commencement of the suit. This is the rule promulgated by this Court, adopted by this Court, and recognized as the leading authority on the continuing violation theory subsequent to its rendition, that case being *Hanover Shoe, Inc. vs. United Shoe Machinery Corp.*, 392 U.S. 481 (1968). Petitioners then begin to speculate as to a potential litigation flood gate concerning all kinds of contractual rights, which should not and could not be considered by this Court. The Petitioners have failed to completely establish the existence of an important federal question not previously answered by this Court. In fact, the question has been answered by this Court, as the decision of the Fifth Circuit in the instant cause relies heavily on prior decisions of this Court, and is totally consistent with all Courts of Appeal who have decided the question, which is reflected directly in the decision of the Fifth Circuit. The decision of the Fifth Circuit is exhaustive as to the interpretations of 15 U.S.C. §15(b) of the other Courts of Appeal who have decided the question, and is careful in aligning its decision so that it would be consistent with the other Courts of Appeal, as well as this Court. Petitioners therefore would have this Court invoke its discretionary review based upon *speculative, non-existent* potential litigation.

Petitioners, having failed to establish an important federal question within the meaning of Rule 19 of this Court, should not be entitled to review of the decision below, and their Petition should be denied.

C.

**THE DECISION OF THE COURT BELOW IS
CONSISTENT WITH THE NEAREST AP-
PLICABLE DECISIONS OF THE SUPREME
COURT.**

Finally, out of desperation, Petitioners attempt to demonstrate that the decision of the Court below misconstrues and misapplies the decisions of this Court in *Zenith Radio Corp. vs. Hazeltine Research, Inc.*, 401 U.S. 321 (1971) and *Hanover Shoe, Inc. vs. United Shoe Machinery Corp.*, supra. This argument is yet another indication, fatal to Petitioners' position, in their quest for discretionary review by this Court.

An analysis of the decision of the Fifth Circuit below reveals that the Fifth Circuit unquestionably read, analyzed and applied the two (2) decisions of this Court with extreme care, to be consistent not only with the decisions of this Court, but to be consistent with the decisions of the other Courts of Appeal who had considered and decided similar questions relative to the application of 15 U.S.C. §15(b) and the continuing violation theory.

Having failed to demonstrate conflict between the Court below and the decisions of this Court on related issues, Petitioners' Petition for Writ of Certiorari should be denied.

CONCLUSION

For the above and foregoing reasons, it is readily apparent that the decision sought to be reviewed herein is wholly consistent with the decisions of all Courts of Appeal who have previously decided similar questions, is consistent with the decisions of this Court applying 15 U.S.C. §15(b), and that no substantial federal question has been brought before this Court pursuant to the provisions of Rule 19 of this Court's Rules. Accordingly, the Petition for Writ of Certiorari to review the decision of the United States Court of Appeal for the Fifth Circuit should be denied.

CERTIFICATE OF SERVICE

The undersigned, a member of the Bar of this Court, hereby certifies, pursuant to Rule 33(1) that true and correct copies of the foregoing Respondents' Brief in Opposition to Petition for a Writ of Certiorari, filed on behalf of Respondents, was served by mail, this 24 day of September, 1977, upon the following:

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